No. 93-517, 93-527, 93-539

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

BOARD OF EDUCATION OF THE KIRYAS JOEL VILLAGE SCHOOL DISTRICT, ET AL.,

Petitioners,

v.

LOUIS GRUMET AND ALBERT HAWK,

Respondents.

On Writ of Certiorari To The New York Court of Appeals

BRIEF OF THE COMMITTEE FOR THE WELL-BEING OF KIRYAS JOEL AS AMICUS CURIAE SUPPORTING RESPONDENTS

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

This brief is submitted on behalf of the Committee for the Well-Being of Kiryas Joel, which represents over 500 members of the Satmar Jewish community of Kiryas Joel who support the decision below.

This case requires this Court to determine whether the Establishment Clause of the First Amendment to the United States Constitution was violated when the state of New York

created a school district to accommodate the desires of Hasidic parents to educate their handicapped children in an insular community under Rabbinical authority. The court below ruled that the law violated the Establishment Clause on its face. *Grumet et. al. v. Board of Education of the Kiryas Joel Village School District*, 81 N.Y.2d 518 (1993). In striking down the state law as unconstitutional, the New York Court of Appeals affirmed two lower court decisions.

Amici believes the facts and circumstances of this case fall squarely within the unconstitutional prohibitions delineated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and its progeny. In particular, examining the school district's operation and the hegemony of the community's religious leadership compels the conclusion that all three *Lemon* prongs render the law unconstitutional.

The Committee for the Well-Being of Kiryas Joel includes over 500 Satmar religious members who reside in Kiryas Joel and strongly observe orthodox Hasidic Jewish laws. They are critical of the Kiryas Joel leadership. The committee is headed by Joseph Waldman, an unsuccessful candidate for the Kiryas Joel School Board who received 673 votes in the district's first election. Waldman is a fifth-generation "Satmar" member who has suffered significant hardship and harassment for his dissident activities.

The Committee firmly believes in respecting Jewish orthodox traditions including those concerning the education of school-age Hasidic Jews, who are required by Jewish law to learn the Torah and Jewish principles through belief in G-d in a religious and talmudical fashion. The Committee also believes in this country's historic commitment toward strengthened religious freedoms as expressed by the Free Exercise and Establishment Clauses of the United States Constitution.

In addition, the Committee believes in preserving the authority of the religious leadership through their Rabbis and the Jewish authorities. However, the Committee opposes the authority of Rabbis and unelected leaders who keep themselves above the Torah, who disrespect their own religious Jewish laws, and who abuse the power of their leadership to enhance their own agenda and political interests in a brutal manner. Accordingly, this Committee has objected to the way the Kiryas Joel religious leadership has exercised its authority.

By presenting facts showing the law which created the Kiryas Joel School District on its face and as applied violates the Constitution, the Committee remains consistent with its mission: to combine the Jewish religion and its principles with the educational values which the children of Kiryas Joel require without bridging the necessary separation between church and state.

This brief is being filed with the written consent of counsel for petitioners, which consent has been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

Chapter 748 of the Laws of 1989 violates the Establishment Clause because it reflects a religious purpose, has the principal and primary effect of endorsing religion and creates an excessive entanglement between government and religion. *Amici* reaches this conclusion by analyzing the law on its face and as applied to facts unique to the Kiryas Joel Village School District.

FACTS [1]

Incorporated in 1977, the Village of Kiryas Joel is situated within the boundaries of the Town of Monroe, Orange County, New York. Approximately 8,500 ultra-orthodox Hasidic Jews live in the village, including approximately 3,000 school-age children, nearly 200 of whom need special education to accommodate such handicaps as mental retardation, deafness, speech and language disorders, Down's Syndrome, spina bifida and cerebral palsy. *Board of Education of the Monroe-Woodbury School District v. Weider*, 72 N.Y.2d 174, 179 (1988). No non-Hasidic family is permitted to live in the Village of Kiryas Joel. Accordingly, the village is culturally, ethnically and religiously isolated. Yiddish is the principal language. Television, radio and English language newspapers are prohibited. Separation of the sexes is observed in the village and its schools. In addition to a religious dress code for males and females, males wear long side curls, head coverings and special garments and women may not maintain even one natural hair and must cover their heads with scarves or short wigs.

Rabbinical authority over the community

Residents of Kiryas Joel are required to strictly observe the religion only as interpreted through the teachings of Grand Rabbi Moses Teitelbaum ("Grand Rabbi"), the proclaimed leader of the world-wide Satmarer Congregation. (*1) Grand

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[1] Amici is aware that not all the facts set out here are in the record on appeal. Amici believes that inclusion of these facts is essential for this Court's understanding of the way Rabbinical leadership controls the Kiryas Joel community and how Chapter 748's application violates the Establishment Clause. This brief makes reference to these facts with starred numbers which match the documents amici has lodged with the Court.

Rabbi Teitelbaum's son, Rabbi Aaron Teitelbaum ("Rabbi"), the spiritual and religious leader of Kiryas Joel, has described the role of religion in the community:

It is the essence of being a Satmar that they adhere to the religious principles, teachings, and orders of their Rabbi. An individual who fails to adhere to the tenets of the Rabbi is no longer following the principles established by the Satmar. There is an inherent commitment to devote every aspect of an individual's being to the Rabbi's teaching and directives. (*2)

Rabbinical authority over community affairs extends beyond religious observance. The Rabbi has traditionally ruled over every aspect of Hasidic life, including religion, education and marriage. Record at 407 (hereinafter "R. ____").

More generally, the Rabbi has described his role as follows:

> [I]t is my solemn duty to instruct the members of my congregation in the commands of the Torah, and in the traditions and teachings of our forefathers and holy Rabbis. In doing so, it is imperative for me to remind my congregation of the religious duty to revere the established religious authority in our Satmar community, including most particularly the authority of the current Grand Rebbe. (*3)

Rabbinical control over the community also includes the enforcement of exclusionary residential policies.

In May 1989, officials of the congregation and the village announced a policy which prohibited any homeowner or contractor from selling or renting property without the prior written approval of a congregation committee. (*4)

Community officials, including the Grand Rabbi, have also enacted a policy which requires all developers wishing to build housing units in the community to pay the yeshiva $10,000 per medium sized unit, with increased costs depending on the size. (*5)

The Grand Rabbi announced these exclusionary policies in local and national Jewish newspapers while the State Legislature debated whether to create a public school district in the village. These policies remain in force and effect.

Creation of the Village of Kiryas Joel School District

Until 1990, when the Kiryas Joel school district commenced operation, disabled school-age children residing in Kiryas Joel attended special education classes at the nearby Monroe-Woodbury Central School District ("Monroe Woodbury").

For religious reasons, Kiryas Joel parents became disenchanted with Monroe-Woodbury's educational services and tried to force Monroe-Woodbury to educate Kiryas Joel students in their owns schools or at a neutral site. *See*, *Board of Education of the Monroe-Woodbury Central School District v. Weider*, 72 N.Y. 174, 180, 188 (1988). The New York Court of Appeals rejected the parents' claim. *Id.* at 187. In response, state legislators introduced Assembly Bill 8747 to create a union free school district within the boundaries of the Village of Kiryas Joel to provide special education services to children residing there. This legislation was introduced to resolve the dispute between Kiryas Joel parents and Monroe-

Woodbury. R. 111. In a letter to New York Governor Mario M. Cuomo, urging that he sign the legislation, Sheldon Silver, the bill's co-sponsor in the State Assembly, made the bill's religious purpose clear, "This bill creates a legislative response to (*Weider*) by providing a mechanism through which students will not have to sacrifice their religious traditions in order to receive the services which are available to handicapped students throughout the state." R. 481.

Counsel to the New York State Education Department expressed doubts about the bill's constitutionality and recommended against passage. R. 99-101. Counsel noted that "the State would be accommodating the religious beliefs of a particular religious sect by enacting legislation that furthers its decision to insulate the children of the village from the larger society." R. 101. In addition, the Budget Report on Bills acknowledged that creation of the district "could establish an undesirable precedent whereby other sects or groups could seek a special legislative chapter to create public school districts in cases where such groups have become disenchanted with the education offered in their existing public school district." R. 127.

On July 24, 1989, Governor Cuomo signed Assembly Bill Number 8747 into law, creating the union free school district now under review. R. 111. This law, Chapter 748 of the Laws of 1989 ("Chapter 748"), took effect on July 1, 1990.

The school board electoral process

The law creating the Kiryas Joel school district provided for a Board of Education composed of from five to nine members elected by qualified village voters. *Grumet v. Board of Education*, 81 N.Y.2d 518, 522 n.1 (1993). The village held its first school board elections in January 1990. R. 598. Village resident Joseph Waldman campaigned for a board

position. R. 598. Waldman competed against seven other candidates, each of whom the Grand Rabbi had selected and directed village residents to elect. (*6) The Grand Rabbi objected to Waldman's candidacy. R. 598.

On December 31, 1989, speaking publicly about the elections, the Grand Rabbi stated:

> Here, the election will take place... the seven people that the law mandates for us to elect, according to the law. It should be a fair election. It's very important to prevent that no split should appear among us, nothing at all. It's like this. With the power of the Torah, I am here the Authority in the Rabbinical Leadership together with the local Rabbi, of course, as you know, I want to nominate seven people and I want these people to be the people... It's an election, and everyone has to go vote; we understand and we don't hold, by any means that we should put out another ballot. This ballot that I put together, with the Leadership of the community... here, I have it. This are the seven people... I wanted to include another name but since he is not interested... the law is that the person has to be willing.

The Rabbi then listed his candidates for the school board:

> The first one is Abraham Weider, then comes Mendel Schwimmer, Mendel Hirsh, Lipa Gross, Moishe Leizer Neiman, Shimon Moishe Kepech and Berel Pollatcheck. Six of these people were by me and the seventh

> one didn't come. Instead of him I placed Berel Pollatchek. (*6)

On October 8, 1989, through the orders of Rabbis Moses and Aaron Teitelbaum, Waldman was expelled from the congregation in retaliation for his dissident activities. R. 598. Invoking a school by-law which required that parents of students enrolled in the main Kiryas Joel yeshiva belong to the congregation, in March 1990, the Teitelbaums expelled Waldman's six children from the school. R. 597, 598. In reinstating the students, the New York State Supreme Court found the expulsions arbitrary and capricious because congregation authorities submitted no evidentiary basis for the five month delay in their effect (the father had been expelled from the Congregation the prior October and this allegedly terminated the children's right to attend), the children's expulsion preceded the end of the school year by only two months and alternative schooling arrangements were infeasible. *Matter of Waldman v. United Talmudical Academy*, 147 Misc.2d 529 (Orange Co. Sup. Ct. 1990). Thereafter, when he refused to follow Supreme Court's direction, the Rabbi was found to be in contempt of court.

On March 31, 1990, one day after Waldman appeared in court to challenge the school expulsion, several hundred people, including the Rabbi, demonstrated in front of his home, chanting "Death to Joseph Waldman" and broke windows in his home by throwing rocks. R. 608-09. Several days later, Meyer Wertheimer, an associate of the Rabbi's, slammed his car into that of a Waldman supporter, a Rabbi, after the latter left Waldman's home. R. 609. At about the same time, the Rabbi initiated a petition drive against Waldman during which coercion was used to collect signatures. R. 609-10.

Contemporaneous newspaper reports indicate the electoral process violently divided the community as a candidate was threatened, his tires were slashed and charges of "dirty campaign tricks" were levied. R. 470-90.

ARGUMENT

CHAPTER 748 VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION BOTH FACIALLY AND AS APPLIED.

The Establishment Clause bars state governments from making laws "respecting an establishment of religion." U.S. Const. Amend. I. *See*, *Everson v. Board of Education*, 330 U.S. 1 (1947) (Establishment Clause held applicable to the states).

While "total separation (between church and state) is not possible in the absolute sense," the Establishment Clause aims "to prevent, as far as possible, the intrusion of either (the church or the state) into the precincts of the other." *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). This Court has reaffirmed these values in subsequent cases. In *Larkin v. Grendel's Den*, 459 U.S. 116 (1982), writing for the Court, Chief Justice Burger opined:

> The purposes of the First Amendment guarantees relating to religion were twofold: to foreclose state interference with the practice of religious faiths, and to foreclose the establishment of a state religion familiar in other eighteenth century systems. Religion and government, each insulated from each other, could then coexist. Jefferson's concept of a 'wall' . . . was a

> useful figurative illustration to emphasize the concept of separateness. Some limited and incidental entanglement between church and state authority is inevitable in a complex modern society, but the concept of a 'wall' of separation is a useful signpost.

Id. at 122-23 (cites omitted).

This Court has consistently applied a three-part test to analyze Establishment Clause matters. To survive such a challenge, "[F]irst, a statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive entanglement with religion.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612-13. *See also*, *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 592 (1989) ("This trilogy of tests has been applied regularly in the Court's later Establishment Clause cases"). This Court reaffirmed *Lemon*'s authority last term. *See*, *Lamb's Chapel v. Center Moriches*, 113 S.Ct. 2141, 2148 n.7 (1993) ("*Lemon*, however frightening it might be to some, has not been overruled").

Chapter 748 violates the Establishment Clause because it violates each prong of the *Lemon* test. Accordingly, the decision of the court below must be affirmed.

(A) No secular purpose justifies the Legislature's creation of the village school district because it stems from the religious order's refusal, on religious grounds, to utilize existing facilities.

A legislative scheme requires a secular purpose. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). "In applying the purpose test, it is appropriate to ask 'whether government's

actual purpose is to endorse or disapprove of religion." *Wallace v. Jaffree*, 472 U.S. 38, 69-70 (1985)(O'Connor, J., concurring), quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring). *See also*, Tribe, *American Constitutional Law* sec. 14-9 at 1205 (2d Ed. 1988) ("[T]he requirement of a secular purpose has perhaps its most basic application in the context of governmental control of activities which some persons wish to undertake for religious reasons").

"The relevant issue is whether an objective observer, acquainted with the text, legislative history and implementation of the statute, would perceive it as a state endorsement." *Id.* at 76. In particular, a statute violates the Establishment Clause where it fuses government and religion and the valid secular purposes it seeks to advance are attainable through other means. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123-24 (1982). *Cf.*, *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988) ("a court may invalidate a statute only if it is motivated wholly by an impermissible purpose") (cites omitted).

An objective observer of the legislative process prior to the enactment of Chapter 748 could only conclude that the government intended to endorse the tenets of the Satmarer sect. Although Monroe-Woodbury had provided an adequate education for handicapped Hasidic students, their parents objected to these services on religious grounds. Chapter 748 is unconstitutional because religious-based objections to the secular education already being provided triggered its passage, and the state possessed other means to educate handicapped Hasidic students. *Larkin*, *supra*.

Before the Kiryas Joel school district was created, "the Monroe-Woodbury school district had offered the village's handicapped students the special services to which they were entitled under federal and state law at the district's public

schools." *Brief for Petitioner Attorney General of the State of New York*, at 4. The court below also concluded that Monroe-Woodbury's educational program satisfied the educational needs of Kiryas Joel students. *Grumet v. Board of Education*, 81 N.Y.2d 518, 531 (1993). "Thus, the only secular need for the statute . . . did not, in fact, exist." *Id.*, at 541 (Hancock, J., concurring).

The State Legislature capitulated to the demands for a school district in Kiryas Joel after parents there objected to existing facilities on religious grounds. Invoking the Free Exercise Clause, the parents opposed, on religious grounds, Monroe-Woodbury's efforts to educate their children. According to the New York Court of Appeals:

> Defendant's constitutional 'right' to services in their own schools or at a neutral site, as asserted in this court, rests on their contention that the Board's public school placements interfere with the free exercise of their sincere religious beliefs guaranteed by the State and Federal Constitutions, that compelling the children to attend regular public school classes and programs forces them to choose between following the precepts of their religion and foregoing benefits on the one hand, and accepting benefits while violating their religious beliefs on the other.

Board of Education of the Monroe-Woodbury School District v. Weider, 72 N.Y.2d 174, 188 (1988) (cites omitted).[2] "That a statute which is clearly intended to meet the special religious requirements of a particular sect is a statute having a religious purpose seems self-evident." *Grumet*, 81 N.Y.2d at 542 (Hancock, J., concurring). Indeed, Chapter 748's co-sponsor made the bill's religious purpose clear upon advocating its passage: "This bill represents a legislative response to (*Weider*) by providing a mechanism *through which students will not have to sacrifice their religious traditions* in order to receive the services which are available to handicapped students throughout the State" (emphasis added). This statement is relevant when determining if the bill reflects a religious purpose. *Wallace v. Jaffree*, 472 U.S. 38, 43, 56-57 (1985) (statute was unconstitutional where the bill's primary sponsor said the bill was motivated by religious considerations).

In *Wallace*, this Court struck down an Alabama law which mandated a period of silence in public schools because the bill lacked a secular purpose. 472 U.S. at 56. Although the law was intended to allow students to meditate or voluntarily pray, this Court concluded that the statute endorsed religion because an existing law allocated a moment of silence in school for students to meditate. *Id.* at 58. The same result is compelled here. Like the existing law which allowed students to meditate in *Wallace*, Kiryas Joel parents had existing means to educate their handicapped children. An objective observer who concludes that religious motivations underscored the subsequent meditation statute in *Wallace* must

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[2] The Court of Appeals did not resolve the parent's Free Exercise claim because it was not raised before the lower courts. *Board of Education of the Monroe-Woodbury School District v. Weider*, 72 N.Y. 174, 188 (1988). This claim is not properly presented here either.

also conclude that religious motivations influenced the creation of a school district in a religious community, particularly after parents there objected, on religious grounds, to existing secular educational services.

This Court's ruling in *Larkin* is instructive. There, the ends sought by a Massachusetts law which granted veto power to churches over liquor license applications for nearby establishments were also attainable through other means, namely by banning liquor establishments outright or ensuring a hearing for the views of affected institutions and according those views great weight. *Id.* at 123-24. While the purported aim of Chapter 748 — to educate disabled children — compares with the desire to "protec[t] spiritual, cultural, and educational centers from the 'hurly-burly' associated with liquor outlets," *Larkin*, 459 U.S. at 124, the valid secular purposes which both statutes advance are attainable through other means. Because Chapter 748 also unconstitutionally fuses governmental and religious functions, *see*, sec. (3) (C) (1), *ante*, it reflects an unconstitutional purpose. *Id.*

(B) The principal and primary effect of the creation of the village district improperly endorses religion.

A legislative scheme violates the Establishment Clause where its principal or primary effect is to advance religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). A governmental practice advances religion where it "has the purpose or effect of 'endorsing' religion." *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 592-593 (collecting cases which apply endorsement standard). *See also*, J. Nowak, R. Rotunda, *Constitutional Law* sec. 17.5, at 1205 n.35 (4th ed. 1991) ("It now appears that the endorsement test used by Justice O'Connor may be blending with the three-part *Lemon* test: the endorsement test may be the way in which the Court determines whether a particular

governmental law or program has a primary effect of advancing or inhibiting religion"). Justice O'Connor has justified her formulation of the endorsement test by its necessity in a pluralistic society:

> Our citizens come from diverse religious traditions or adhere to no particular beliefs at all. If government is to be neutral in matters of religion, rather than showing either favoritism or disapproval towards citizens based on their personal religious choices, government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community.

County of Allegheny, 492 U.S. at 627 (O'Connor, J., concurring).

Accordingly, "the Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community." *County of Allegheny*, *supra*, at 593-94 (citing *Lynch v. Donnelly*, 465 U.S. at 687 (O'Connor, J., concurring).

To determine the statute's principal effect, the Court must examine Chapter 748 in the context surrounding its enactment, along with its perceived and actual effect on the advancement of religion. In *County of Allegheny*, this Court considered religious displays in their context to determine whether they violated the Establishment Clause. In *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985), this Court

cautioned that "the Establishment Clause guards against more than direct, state-funded efforts to indoctrinate youngsters in specific religious beliefs. Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any — or all — religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated." *Id.* at 389.

Examined in the context of Rabbinical control over the Satmarer sect and Kiryas Joel in particular, the principles enunciated in *County of Allegheny* and *Grand Rapids* render Chapter 748 unconstitutional.

At the time Chapter 748 was debated and passed, the State Legislature was on notice that Kiryas Joel was an atypical community. Simply categorizing the community as Hasidic ignores the role of the Rabbi and Grand Rabbi over community affairs. According to the Rabbi:

> It is the essence of being a Satmarer that they adhere to the religious principles, teachings, and orders of their Rabbi. An individual who fails to adhere to the tenets of the Rabbi is no longer following the principles established by the Satmar. There is an inherent commitment to devote every aspect of an individual's being to the Rabbi's teachings and directives.

Because the Grand Rabbi had selected and endorsed the candidates for Kiryas Joel's first school board election, and punished a leading dissident for campaigning against Rabbinical authority, substantial doubt is cast on the democratic nature of the electoral process governing this

school district. Moreover, the exclusionary residential policies which community leaders have promulgated and enforced undermines their pronouncement that the schools can remain free from improper religious influence. These policies were announced as the State Legislature debated whether to create the district. Chapter 748 thus advances religion in its principal and primary effect because its passage constitutes an endorsement by state officials of the Satmarer faith as promulgated by Kiryas Joel community leaders. *Lemon v. Kurtzman*, 403 U.S. at 612.

Moreover, Chapter 748 fails the endorsement test because creating a school district in a Rabbinically-controlled community like Kiryas Joel makes "adherence to (the Satmarer sect) relevant . . . to a person's standing in the political community." *County of Allegheny*, 492 U.S. at 593-94, citing *Lynch v. Donnelly*, 465 U.S. at 687 (O'Connor, J., concurring). No other community like Kiryas Joel exists in the surrounding area, much less one whose population must adhere to Jewish law according to Rabbinical orders. By not allowing non-Satmarers to move into the village of Kiryas Joel, this village becomes a political religious community of only one religious sect. By catering to the desires of this sect, the State Legislature endorsed the sect's religion and behavior. If displaying a creche in a county courthouse creates the effect of endorsing the Christian faith, *County of Allegheny*, 493 U.S. at 601-02, then granting Kiryas Joel a school district, in light of the strict religious control governing its public life, clearly endorses this Rabbi's authoritarian behavior. This is especially true considering the approach to education taken by ultra-orthodox Hasidim, who view religious education as a necessity and seek to educate their children about the Torah.

Finally, Chapter 748 "fosters a close identification of (the government's) powers and responsibilities with those of" the Satmarer sect. Creation of a school district in Kiryas Joel, in

light of the screening process for incoming residents, not to mention the veto power community leaders possess over a renter's desire to lease property to an outsider, and the requirement that developers must pay the Yeshiva $10,000 per unit, is tantamount to the government promoting the Satmarer faith. Indeed, the community leaders who enforce these restrictive policies and Rabbinical orders are the same people who benefit from the school district's creation. *See*, *Grand Rapids*, 473 U.S. at 389. [3].

(C) The village school district creates an excessive entanglement between government and religious authorities

A governmental practice violates the Establishment Clause when it creates an excessive entanglement between government and religion. *Lemon v. Kurtzman*, 403 U.S. at 613, citing *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970). Close scrutiny is necessary to determine whether a church-state relationship amounts to an excessive entanglement. *Lemon*, *supra*, at 614. Accordingly, the *Lemon* Court established the following guidelines necessary to this inquiry:

> In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefitted, the nature of the aid that the

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[3] Abraham Wieder, President of the petitioner School Board, also serves as President of the Congregation, one of three board members of the Yeshiva, Deputy Mayor of the Village and the Village/Congregation/School Board's chief spokesperson. Simon Kepec, President of the Yeshiva, is also a member of petitioner School Board. Mendell Schwimmer, a Village Trustee, is a school board member.

> State provides, and the resulting relationship between the government and the religious authority.

Id. at 615.

Both facially and as applied, Chapter 748 clearly constitute an excessive entanglement.

(1) The Grand Rabbi's ability to slate and successfully endorse candidates creates an excessive entanglement because he is effectively vested with power over governmental functions.

A statute vesting governmental powers with religious authorities violates the Establishment Clause because it creates an excessive entanglement. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126-27 (1982). "Government can run afoul of (the Establishment Clause) . . . (by) excessive entanglement with religious authorities, which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines." *Lynch v. Donnelly*, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring)(citing *Larkin*, *supra*). The prohibition against governance by religious authorities is consistent with the long-held fear that religious oppression may result from church control over civil society. "At the time of the Revolution, Americans feared not only a denial of religious freedom, but also the danger of political oppression *through a union of civil and ecclesiastical control.*" *Id.* at 127 n.10 (citing B. Bailyn, *Ideological Origins of the American Revolution* 98-99, n.3 (1967)). *See also*, *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) ("The real object of the [First] Amendment was . . .

to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government"), quoting 3 J. Story, *Commentaries on the Constitution of the United States* 728 (1833).

The process governing Kiryas Joel school board elections creates an excessive entanglement in two ways: First, no logical distinction exists between the church control over liquor licenses held unconstitutional in *Larkin* and the Grand Rabbi's control over school board candidates here. Secondly, the Grand Rabbi effectively sets school board policy by selecting its members and punishing those who seek office without his endorsement, such as dissident Joseph Waldman, who campaigned without Rabbinical permission. Accordingly, Chapter 748 unconstitutionally vests legislative power over this "public" school district in Kiryas Joel's religious hierarchy.

In *Larkin*, this Court invalidated a Massachusetts statute which vested "significant government authority in churches" by granting them veto power over liquor license applications for establishments located near the church. *Id.* at 126. In holding the scheme unconstitutional, this Court reasoned:

> [T]he core rationale underlying the Establishment Clause is preventing 'a fusion of governmental and religious functions. The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions.

Id (cites omitted).

The *Larkin* Court applied the "neutrality" principle governing the Establishment Clause as articulated in *School District of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 222 (1963). This principle aims to prevent "powerful sects or groups (from) bring(ing) about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or all orthodoxies." *Id.* In *Larkin*, this Court concluded that "nothing could be more offensive to the spirit of the Constitution" than a statutory scheme which allowed churches absolute control over significant matters normally left to the legislature. 459 U.S. at 127. The same result is compelled here.

Like the legislative power granted to the church in *Larkin*, the electoral process here unconstitutionally fuses religious and governmental functions because the Grand Rabbi admittedly hand-picks the Kiryas Joel School Board. The Grand Rabbi's authority over community affairs guarantees the election of any school board candidate he endorses. In fact, the Grand Rabbi severely punished one school board candidate who campaigned without his blessing, sending a message to other dissidents that the community's religious leadership tolerates no independent candidacies even for clearly public offices. The power to select political candidates is as much a governmental function as the power, examined in *Larkin*, to grant liquor licenses. This Court has equated a political organization's racially-motivated rejection of political candidates with unconstitutional state action where the organization's endorsement, as a practical matter, was tantamount to election. *Terry v. Adams*, 345 U.S. 461 (1945). *Compare*, *Smith v. Allbright*, 321 U.S. 649 (1944) ("[t]he privilege of membership in a political party may be . . . no concern of a State. But when, as here, that privilege is also the essential qualification for voting in a primary to select

nominees for general election, the State makes the action of the party the action of the State"). Just like the racial eligibility scheme that was struck down in *Terry* because of the discharge of a governmental function by private parties in a discriminatory manner, the Grand Rabbi's prohibition against dissident school board candidacies taints the "public" nature of the Kiryas Joel school district and invalidates it. *See*, *Chicago Police Department v. Mosley*, 408 U.S. 92 (1972) (ordinance could not single out labor picketing for punishment because the Equal Protection Clause prohibits content-based speech restrictions). Accordingly, the electoral process created pursuant to Chapter 748, as applied, clearly violates the Establishment Clause pursuant to *Lemon*'s requirement that courts "closely scrutin(ze)" the "resulting relationship between government and religious authority" to protect against an excessive entanglement. *Lemon v. Kurtzman*, 403 U.S. 602, 614, 615 (1971) (cite omitted).

Moreover, the Grand Rabbi's influence over school board policy is inherent and based upon religious teachings fundamental to the Satmarer sect. If only his candidates may run for the school board without fear of ostracism, banishment and violence, one cannot expect the governing body to independently decide educational matters apart from the Grand Rabbi's influence. Hence, the Grand Rabbi is effectively vested with the governmental function of setting school district policy, a result which plainly violates the Establishment Clause just as clearly as Massachusetts's statute which allowed churches to enforce the liquor laws by granting them power to decide which establishments to license. *Larkin*, *supra*. Here, as in *Larkin*, the "statute enmeshes churches in the exercise of substantial governmental powers contrary to (this Court's) interpretation of the Establishment Clause." *Id.* at 126. This fusion between governmental and religious functions "substitutes the unilateral and absolute power of the (Grand Rabbi) for reasoned decisionmaking of a public legislative

body acting on evidence and guided by standards, on issues with significant economic and political implications." *Id.* at 127. *Lemon* makes clear the unconstitutional nature of this arrangement: "Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and *churches excluded from the affairs of government*." *Lemon*, 403 U.S. at 625 (emphasis added). Because the Grand Rabbi's power is elevated by the nature of his control over the electoral process, Chapter 748 violates the Establishment Clause.

The Grand Rabbi's de facto control over school board operations distinguishes this Court's holding in *McDaniel v. Paty*, 435 U.S. 618 (1978). There, this Court held that the state cannot disqualify religious figures from serving in state governments. By contrast, the Grand Rabbi here does not formally serve on the Kiryas Joel School Board. Rather, his control and influence over the body is inescapable and absolute in view of his power to select its members and successfully command residents to vote for them. The Grand Rabbi's punishment of a school board candidate who ran against his wishes surely sends a message to board members placed there by the Grand Rabbi: the Kiryas Joel School District is run as the Grand Rabbi desires. *See*, *Larkin*, *supra*.

(2) The excessive entanglement caused by creation of the village school district has fostered the kind of divisiveness necessary to constitute a violation of the Establishment Clause.

The divisive nature of a legislative scheme plays a role in determining whether church and state are excessively entangled. *See*, *Lemon v. Kurtzman*, 403 U.S. 602, 623 (1971) ("A broader base of entanglement of yet a different character is presented by the divisive political potential of

these state programs"). *See also*, *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373, 383 (1985) (state aid to parochial schools creates potential for divisiveness); *Committee for Public Education v. Nyquist*, 413 U.S. 756, 794-98 (1973)(same); *Aguilar v. Felton*, 473 U.S. 402, 414 (1985) (political divisiveness along religious lines increases where state administrators must determine if a state-funded program for sectarian schools is used for religious messages).

While this Court has stated that divisiveness alone will not render a scheme unconstitutional, *Lynch v. Donnelly*, 465 U.S. 668, 684 (1984), the potential for divisiveness is elevated where the state power is vested with religious authorities. In striking down a statutory scheme granting churches veto power over liquor license applications, this Court noted the potential for "[p]olitical fragmentation and divisiveness on religious lines" that would result therefrom. "Ordinary human experience and a long line of cases teach that few entanglements could be more offensive to the spirit of the Constitution" (cite and footnotes omitted). *Larkin v. Grendel's Den*, 459 U.S. 116, 127 (1982).

Here, as discussed in sec. (C) (1), *supra*, Section 748 vests state power with religious authorities because, in practice, they control school board candidate selection and punish candidates who seek office without the leadership's approval. As the *Larkin* Court had predicted, this arrangement has led to significant divisiveness among Kiryas Joel residents. Community dissident Joseph Waldman, because he ran for the Kiryas Joel School Board, cost his children their opportunity for a private religious education. A state court reinstated the children after concluding they were expelled for arbitrary and capricious reasons. *Matter of Waldman v. United Talmudical Academy*, 147 Misc.2d 529 (Orange Co. Sup. Ct. 1990). The dissident then experienced a harassment campaign in retaliation for suing religious

authorities. Contemporaneous newspaper articles show the candidate's tires were slashed during the campaign. This kind of division, alarming even when sparked by normal political differences, clearly offends the Establishment Clause because division "along religious lines was one of the principal evils against which the First Amendment was intended to protect. [To] have States [divide] on [these] [would] tend to obscure other issues of great urgency." *Lemon*, 403 U.S. at 622-23.

This Court has frequently noted the role elections play in advancing the democratic process. *See*, *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964)("[O]ne man's vote . . . is worth as much as another's"). The aggressive nature of many elections at all levels of government points up the divisive nature of Chapter 748, under which Rabbinical slating of candidates took root during the community's first school board elections. Because Chapter 748, as applied, constitutes an excessive entanglement between government and religion, *see* sec. C (1), this Court should heed the *Lemon* Court's warning against divisiveness sparked by "political division along religious lines," 403 U.S. at 622, and find Chapter 748 unconstitutional.

(3) The state must continually monitor the school district in light of the Grand Rabbi's ability to control the district's affairs.

A legislative scheme violates the Establishment Clause as an excessive entanglement where the state must monitor religious institutions to ensure public money is not used for religious purposes. *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971). *See also*, *Aguilar v. Felton*, 473 U.S. 402, 411-412 (1985)(prophylactic monitoring is especially pressing where state money flows to sectarian elementary schools as opposed to institutions of higher learning).

The unique powers exercised by Rabbinical authorities within the Kiryas Joel community necessarily require state authorities to monitor the school district to ensure they do not unconstitutionally govern school affairs. The record reveals that the community is, in fact, governed that way. *See*, sec. C (1), *supra*. For there to be any chance that this school district might function in a manner consistent with constitutional values, state authorities would have to constantly monitor the electoral process and other activities over which Rabbinical authorities can exert their influence. Because his congregants must heed their Rabbi's advice and, for example, seek his permission before renting to incoming residents and ignore community members he deems undesirable, the only way to ensure that this influence does not taint community's public school is constant state observation. The Establishment Clause prohibits this result.

This Court has frequently ruled that financial aid to religious institutions was unconstitutional because the degree of state supervision which would be necessary to ensure that public money is used for secular purposes excessively would entangle church and state. *See*, *e.g.*, *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971) ("A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these (monetary) restrictions are obeyed and the First Amendment otherwise respected").

In *Aguilar v. Felton*, 473 U.S. 402 (1985), this Court explained the rationale for striking down programs which allocate money to parochial schools:

> The principle that the state should not become too closely entangled with the church in the administration of assistance is rooted in two concerns. When the state becomes enmeshed with a given

> denomination in matters of religious significance, the freedom of religious belief of those who are not adherents of that denomination suffers, even when the governmental purpose under lying the involvement is largely secular. In addition, the freedom of even the adherents of the denomination is limited by the governmental intrusion into sacred matters. '[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.

Id. at 409-10, quoting *McCollum v. Board of Education*, 333 U.S. 203, 212 (1948).

Unconstitutional aid schemes which this Court has struck down as excessively entangling compare with the creation of a public school district in the religiously-dominated Village of Kiryas Joel.

In *Aguilar*, this Court struck down New York City's Title I program as unconstitutional because it had used federal money to finance programs which involved sending public employees into religious schools for a variety of services. *Id.*, 473 U.S. at 404-07. This arrangement necessitated a pervasive state presence in the sectarian schools receiving aid to ensure the money was truly used for secular purposes.

Like the Title I program which this Court struck down in *Aguilar*, "the scope and duration" of the Kiryas Joel school district "would require a permanent and pervasive state presence in the sectarian school[] receiving aid." *Id.* at 412-13. Neither party disputes that the district receives state

assistance. Moreover, Chapter 748 is as permanent as any aid program because the creation of a public school district triggers the infusion of state money, and the Satmarer sect is not expected to alter its vision of the model congregation anytime soon.

CONCLUSION

For foregoing reasons, the decision of the court below should be affirmed.

Respectfully submitted,

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